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No. 06-157

In the Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL., PETITIONERS

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents' brief reads as if taxpayer standing is the rule under our Constitution, not a narrow exception. But the "general rule" is that taxpayers *lack* standing to challenge government action, no matter how unconstitutional they may allege it to be. *Bowen* v. *Kendrick*, 487 U.S. 589, 618 (1988). That principle is firmly grounded in Article III and the separation of powers. See *Daimler-Chrysler Corp.* v. *Cuno*, 126 S. Ct. 1854, 1860-1864 (2006). In *Flast* v. *Cohen*, 392 U.S. 83 (1968), the Court recognized a narrow exception to that rule for a limited subset of Establishment Clause challenges. In so doing, the Court specifically declined the suggestion of Justice Douglas to allow all taxpayer suits, see *id.* at 107-114, and of Justice Fortas to allow taxpayer suits for all Establishment Clause claims, *id.* at 115-116. Instead, this Court in *Flast* and in the four decades since has carefully confined taxpayer standing to suits that meet two criteria. First, the suit must challenge "*only* * * * exercises of *congressional* power under the taxing and spending clause of Art. I, § 8, of the Constitution." *Id.* at 102 (emphasis added). Second, the challenge must seek to vindicate the Establishment Clause's specific limitation on that congressional power. *Ibid.*; see *DaimlerChrysler*, 126 S. Ct. at 1864.

Respondents seek to discard both prongs and subsume the standing inquiry into a single question of traceability. But this Court has never conceptualized the *Flast* nexus requirements as a traceability standard. In any event, respondents clearly have something much grander than the mere reconception of existing limits in mind. Their effort to recast taxpayer standing doctrine as a traceability requirement appears designed to water down the requirements of *Flast* sufficiently to allow their suit to proceed. Their traceability test, however, offers nothing of substance to distinguish their current challenges from those they have apparently abandoned (such as their initial complaint alleging an Establishment Clause violation based on a single speech by the Education Secre-

tary) or from any other Executive Branch action financed by appropriations. Respondents prudently abandon even the Seventh Circuit's de minimis exception (Br. 20 n.6), but fail to explain why their traceability standard does not allow taxpayer standing to challenge each and every Executive Branch action alleged to violate the Establishment Clause.

Rather than replace something with nothing, this Court should reaffirm the limited nature of the *Flast* exception. *Flast* recognized a narrow exception for exercises of congressional taxing and spending authority that, by transferring government largesse to outside entities for religious use, could be conceived of as the functional equivalent of state-compelled tithes. Both this Court's precedent and the constitutional commands of Article III preclude any expansion of taxpayer standing beyond that specific context. And respondents, who allege that Executive officials are unlawfully participating in conferences and making speeches that are funded in the most indirect means through general appropriations, have not come close to satisfying *Flast*'s established elements, much less the requirements of Article III.

A. *Flast* Is Carefully Limited To Challenges To Congress's Exercise Of Its Taxing And Spending Power

1. History and Precedent Require a Challenge to Congressional Power

Five times this Court has addressed the elements of taxpayer standing under *Flast* and five times this Court has held that an indispensable element is a challenge to Congress's taxing and spending power.[1] That is the "only" type of suit permitted. *Valley Forge Christian Coll.* v. *Americans United*

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[1] See *Kendrick*, 487 U.S. at 619-620; *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 479 (1982); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 225 n.15 (1974); *United States* v. *Richardson*, 418 U.S. 166, 175 (1974); *Flast*, 392 U.S. at 102; see also *DaimlerChrysler*, 126 S. Ct. at 1864.

for Separation of Church & State, Inc., 454 U.S. 464, 479 (1982); *Flast*, 392 U.S. at 102. Where, by contrast, responsibility for the allegedly unconstitutional conduct lies in the exercise of Executive Branch power, taxpayer standing has been denied. A constitutional objection to "a particular Executive Branch action arguably authorized by [an] Act [of Congress]" will not suffice. *Valley Forge*, 454 U.S. at 479.[2] Indeed, this Court in *Valley Forge* was clear that the challenge there "[was] deficient in two respects:" not just that the only congressional authority at issue was the Property Clause, but also the simple fact that the target of their challenge was "not a congressional action," but an executive action. *Ibid.* Moreover, the Court has repeatedly rejected standing for challenges to executive actions, notwithstanding that all of the challenged Executive Branch activities necessarily entailed the use and expenditure of appropriated funds.[3]

The restriction of taxpayer standing to challenges to congressional taxing and spending is constitutionally compelled. Taxpayers generally lack Article III standing. See Pet. Br. 12-16. *Flast* found Article III satisfied only with respect to a "specific evil[] feared by those who drafted the Establishment Clause," which was that Congress's taxing and spending power would be used to "force a citizen to contribute three pence only of his property for the support of any one establishment." 392 U.S. at 103. Although other government action—congressional or executive—can violate the Establishment Clause, only congressional exercises of the taxing and

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[2] See *Schlesinger*, 418 U.S. at 228 & n.17 (no taxpayer standing to challenge "the action of the Executive Branch" and the "invalidity of Executive action in paying" out taxpayer funds); *Richardson*, 418 U.S. at 175 (no standing where the challenge was "not addressed to the taxing or spending power," but to Executive Branch compliance with the law); see also *Doremus* v. *Board of Educ.*, 342 U.S. 429, 434 (1952).

[3] See *Valley Forge*, 454 U.S. at 466-467 & n.4; *Schlesinger*, 418 U.S. at 211, 228 & n.17; *Richardson*, 418 U.S. at 168-169 (seeking to enjoin publication of a governmental report and reporting procedures).

spending power to bestow government largesse on the religious activities of others can give rise to Article III standing for a taxpayer.

Under *Flast*, that particular form of congressional action provides a basis for taxpayer standing not because it is more serious or obvious than other alleged Establishment Clause violations. After all, it is clear that even a joint resolution declaring one denomination the national religion would not give rise to taxpayer standing. Rather, congressional taxing and spending alone can give rise to Article III standing for a taxpayer because that particular governmental action is analogous to a state-compelled tithe, which not only was a principal concern of the Framers, but also is a practice that has a distinct nexus to taxpayer status.[4] The Court in *Flast* accordingly held that only when a taxpayer seeks to vindicate, not the Establishment Clause writ large, but that "specific constitutional limitation[] imposed upon the exercise of the congressional taxing and spending power," 392 U.S. at 103, an Article III injury in fact arises, *id.* at 102-103.

Respondents' answer to that body of precedent demarcating the narrow, historic bounds of taxpayer standing is to deny its existence. First, respondents insist (Br. 22) that "*Flast* v. *Cohen* did not present a challenge to congressional action." This Court held the opposite. See 392 U.S. at 85 ("In this case, we must decide whether the *Frothingham* barrier should be lowered when a taxpayer *attacks a federal statute* on the ground that *it* violates the Establishment and Free Ex-

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[4] If Congress enacted a tax for the specific purpose of funding religious entities, a taxpayer qua taxpayer would have standing to seek a refund. *Flast* extends taxpayer standing to the situation where the congressional decision to tax and the congressional decision to fund third-party religious recipients are separated and the prospect of a refund remote. Even that extension has been subject to criticism, see, *e.g.*, 392 U.S. at 116-133 (Harlan, J., dissenting); U.S. Br. 49 n.17, but any further expansion of *Flast* would untether it from the irreducible minimum requirements of Article III standing.

ercise Clauses of the First Amendment.") (emphasis added).[5] While the Court noted that the complaint also included a "nonconstitutional ground for relief"—a statutory argument that federal officials' authorization of payments "are in excess of their authority under the Act"—the Court expressly rested its jurisdiction (and that of the three-judge court below) on the inclusion of an "alternative and constitutional ground for relief, namely, a declaration that * * * the Act is to that extent unconstitutional and void." *Id.* at 90.[6]

Second, respondents argue (Br. 25-28) that *Bowen* v. *Kendrick* opened the door to taxpayer suits challenging discretionary Executive Branch activities. But *Kendrick* expressly "adhered to *Flast*" and reiterated that *Flast* standing is limited to Establishment Clause challenges to "exercises of congressional power under the taxing and spending power." 487 U.S. at 618. The Court also repeated that "a challenge to

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[5] See also *Flast*, 392 U.S. at 86 ("Appellants' constitutional attack focused on the *statutory criteria* * * * for federal grants under the Act.") (emphasis added); *id.* at 87 (challenging that "federal funds have been disbursed *under the Act*") (emphasis added); *ibid.* (seeking a declaration that "the Act['s]" authorization of such disbursements "is to that extent unconstitutional and void"). Respondents' argument (Br. 33) that *Flast* concerned the constitutionality of Executive Branch appropriations, rather than the Elementary and Secondary Education Act of 1965, is baffling because the Court identified the statutory target of the taxpayers' challenge by name and framed the constitutional argument as a challenge to that "Act," not to some separate appropriation provision or legislation. 392 U.S. at 90.

[6] The Court did not understand the taxpayers to be arguing that the actions of the Executive Branch were themselves unconstitutional, because the Court described the alternative argument as couched solely in terms of statutory authority. *Flast*, 392 U.S. at 90. Respondents' reliance on select quotations from briefs overlooks that, when confronted with the government's challenge to jurisdiction, Flast was quick to confirm in her reply brief that "[i]t has been our position throughout the proceedings that * * * the statute is unconstitutional" to the extent that it authorizes disbursements to religious schools. Pet. Reply Br. 2 (No. 416); see also Pet. Reply to Mot. to Dismiss 2 (No. 416) ("[T]he plaintiffs agreed * * * that the only issue before the three-judge court would be the constitutionality of Title I and Title II" as applied.).

executive action" would not support taxpayer standing and, for that reason, the Court was at pains to describe the taxpayers' as-applied constitutional claim as "a challenge to congressional taxing and spending power." *Id.* at 619.

To that end, the Court stressed that the taxpayers' challenge remained focused, on "funding authorized by Congress [that] has flowed" to outside entities and "be[en] disbursed"—not pursuant to Executive Branch discretion—but "pursuant to the [Act]'s *statutory mandate*." *Kendrick*, 487 U.S. at 619-620. The statute was "at heart a program of disbursement of funds pursuant to Congress's taxing and spending powers." *Id.* at 619-620. Indeed, the statutory text itself made four references to the involvement of outside religious groups, *id.* at 595-596, and the Court viewed it as obvious that taxpayers had standing to challenge the Act on its fact, *id.* at 618. All *Kendrick* held was that the fact that the Executive Branch played a necessary part in putting that "[statutory] program of disbursement" into effect by disbursing funds to particular recipients did not make the as-applied challenge to the statute "any less a challenge to congressional taxing and spending power." *Id.* at 619, 620; see *id.* at 620 (finding "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute").[7]

Here, by contrast, there is no statutory mandate—much less any "[statutory] program of disbursement," *Kendrick*, 487 U.S. at 619—for taxpayers to challenge. The best that respondents can point to is a non-discrete set of "Congressional budget appropriations." Br. 32. But respondents' complaint

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[7] Although respondents' suggest that the government is merely reprising its unsuccesful argument in *Kendrick* (Br. 25-27), it is worth noting that not only is the context completely distinct, but also that the entirety of the government's standing argument in *Kendrick* consisted of two footnotes. See U.S. Br. 31 n.24, *Kendrick*, *supra*, (No. 87-253); U.S. Reply Br. 2 n.2, *Kendrick*, *supra* (No. 87-253).

is not with those general appropriations, but with the discretionary actions of the Executive Branch. Nor does the challenge before this Court take issue with any congressionally directed disbursements to outside entities that fit *Flast*'s historic paradigm for taxpayer injury. Unlike the plaintiffs in *Kendrick*, respondents here have utterly failed to identify any "direct dollar-and-cents injury" (*Doremus*, 342 U.S. at 434) that confers standing.

2. *Respondents Do Not Challenge the Constitutionality of Federal Law As Applied*

The fundamental flaw in respondents' argument is that it equates an as-applied challenge to an Act of Congress with a challenge to the Executive Branch's discretionary use of general appropriations. See Resp. Br. 32-34. In respondents' view, challenges to the constitutionality of an Executive Branch action that entails the "spending of funds" (*id.* at 27)—which is essentially everything the Executive does—is the equivalent of an as-applied challenge to an appropriations law. That argument is foreclosed by precedent, common experience, and Article III's constitutional command.

a. Precedent

The Court's decision in *Valley Forge* squarely rejected the argument that the Executive Branch's "spending of funds" (Resp. Br. 27) is sufficient to support taxpayer standing. "[T]he expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer." 454 U.S. at 477; see *id.* at 479 n.15 (objecting to "a particular Executive Branch action arguably authorized by [an] Act [of Congress]" will not support standing). That language was not accidental. The Court expressly considered and rejected the contention that the taxpayers' standing to bring suit "extends to the Government as a whole, *regardless of which branch is at work in a particular instance*, and re-

gardless of whether the challenged action was an exercise of the spending power." *Id.* at 484 n.20 (emphasis added).

This case presents an *a fortiori* application of *Valley Forge*. The challenged use of taxpayer money here is for the discretionary administrative expenses associated with the day-to-day activities of government officials (such as salaries and resource costs). See Pet. Br. 26 n.8; Pet. App. 73a-77a. Unlike *Valley Forge*—where the government conveyed a 77-acre tract of land to a Christian college, 454 U.S. at 468—in this case there is no allegation that petitioners disbursed *any* federal funds, property, or other form of governmental largesse to entities outside the government. The most that is alleged is that Executive officials' conduct was intended to create a "climate conducive to funding." Pet. App. 76a. Furthermore, while meetings and discussions between government officials and religious groups are commonplace and unobjectionable (see Pet. Br. 39-41 & n.13), preferential governmental grants of land (glebes) to religious entities for their religious use was as much a hallmark of established religions as support through taxation.[8]

In addition, the Executive Branch activity at issue in *Valley Forge* involved the devotion of substantial agency resources to evaluating property and determining whether use of the property by a religious or secular entity would provide "the greatest public benefit," *Valley Forge*, 454 U.S. at 466-467 & n.4 (citing 34 C.F.R. 12.5, 12.9(a) (1980)), as well as monitoring its use after the transfer, 80-327 J.A. 15. Under that program, the government had authorized more than 650 different transfers of surplus government property to reli-

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[8] See, *e.g.*, *Late Corp. of the Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U.S. 1, 60 (1890); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Pt. 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2148-2151 (2003).

gious institutions, the fair market value of which (*in toto*) amounted to nearly $26 million.[9]

Respondents summarily dismiss *Valley Forge* as involving the use of taxpayer funds for administrative expenses that "would not have been 'fairly traceable' to the challenged conduct" (Br. 37-38). That argument only serves to underscore the arbitrary nature of respondents' "traceability" inquiry. The taxpayer dollars spent to purchase and improve the land was a matter of record, U.S. Br. 5-6, *Valley Forge*, *supra* (No. 80-327), and the identities of the committees of agency officials and agency activities involved in the transfer decision and process (such as conducting land surveys and economic studies) were known or at least sufficiently knowable to trace some taxpayer dollars to the program, see *id.* at 22 n.11; J.A., *Valley Forge*, *supra*, 13-15 (No. 80-327). At a minimum, the surplus property program provided substantially more hard data for identifying the expenditure of taxpayer funds than discerning what portion of agency salaries and day-to-day administrative expenditures might have been employed with the "inten[t] to preferentially promote" an allegedly unconstitutional funding "climate." Pet. App. 76a.[10]

Respondents' theory that an as-applied challenge to a statute and a challenge to the Executive's discretionary or regulatory activity are fungible is also wholly incompatible with *Doremus* v. *Board of Education*. In *Doremus*, the Court, in a decision by Justice Jackson, rejected taxpayer standing to

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[9] *Americans United for Separation of Church & State, Inc.* v. *Department of Health, Educ. & Welfare*, 619 F.2d 252, 254 (3d Cir. 1980), rev'd, 454 U.S. 464 (1982).

[10] Respondents' alternative argument that *Kendrick* overruled that aspect of *Valley Forge* that prohibited taxpayer challenges to agency action is simply wrong. The Court in *Kendrick* emphasized its adherence to precedent, 487 U.S. at 618, and would have had no need to end its standing decision by emphasizing that the plaintiffs' challenge was to "a program of disbursement of funds pursuant to Congress' taxing and spending powers" and "statutory mandate" if challenges to executive action sufficed, *id.* at 619-620.

challenge a state statute that enlists teachers in the reading of the Bible to students during the school day. 342 U.S. at 434. While the teachers' salaries and purchase of the Bibles were funded with tax dollars, the Court rejected the notion that the plaintiffs suffered any injury as taxpayers, explaining that "the grievance which it is sought to litigate here is not a direct dollar-and-cents injury but is a religious difference." *Ibid.* The Court was careful to preserve *Doremus* in *Flast*, as an example of a program that inflicts a regulatory injury, rather than a dollars-and-cents injury. See *Flast*, 392 U.S. at 102. The taxpayers challenge in this case to the actions of Executive officials at conferences is no more a "good-faith pocketbook action" (*Doremus*, 342 U.S. at 434) than the challenge asserted unsuccessfully in *Doremus*.[11]

b. Established Usage

Respondents' effort to blur the distinction between as-applied challenges to statutes and challenges to Executive actions ignores established practice. In the typical as-applied challenge, a plaintiff challenges the application in a particular context (usually, but not always, by virtue of some executive act of enforcement) of statutory terms, conditions, and prohibitions chosen by Congress to accomplish particular legislative goals.[12] Thus, pursuant to the statutory program at issue in *Kendrick*, Congress specifically directed the inclusion of

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[11] *Doremus* and this Court's subsequent decision in *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), which invalidated Bible reading in a case brought by plaintiffs who suffered direct Article III injuries, *id.* at 224 n.9, also make clear that rhetoric by respondents and their amici about Executive Branch misconduct going unexamined if taxpayers cannot sue is wide of the mark. Although the absence of an alternative plaintiff does not suspend Article III's limitations on standing, *Valley Forge*, 454 U.S. at 489, in most cases, the consequences of not permitting every federal taxpayer to sue will not result in the absence of an appropriate plaintiff to litigate alleged misconduct.

[12] See, *e.g.*, *Gonzales* v. *Raich*, 545 U.S. 1 (2005); *Tennessee* v. *Lane*, 541 U.S. 509 (2004); *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550 (2005).

religious entities, see 487 U.S. at 593-596 (discussing statutory provisions), and the as-applied challenge for which the Court found standing focused on the constitutionality in actual operation of "the partnership between governmental and religious institutions *contemplated by the AFLA*," *id.* at 623 (O'Connor, J., concurring) (emphasis added).

Respondents have brought no such as-applied challenge in this case. They do not argue that the general criteria that accompany lump-sum appropriations to the Executive Branch are unconstitutional either on their face or as applied. Respondents have not even identified the specific appropriations laws pursuant to which the activities at issue here were allegedly funded (Pet. App. 10a), let alone taken issue with the application of express statutory criteria in a particular context. The best that respondents have mustered (Br. 32) is an allegation that "Congressional budget appropriations" are somewhere in the picture. But the Executive Branch's discretionary judgment concerning "[t]he allocation of funds from a lump-sum appropriation is an[] administrative decision traditionally regarded as committed to agency discretion." *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993). Indeed, it is "a fundamental principle of appropriations law" that, when Congress "appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions." *Ibid.* Under those circumstances, it is clear that respondents' challenge, like that of the plaintiffs in *Valley Forge* and *Doremus*, is a challenge to Executive action, not a challenge —either facial or as-applied—to a taxing and spending decision of Congress.

Moreover, when a challenge shifts from the actual application of a statute in a concrete setting to the general actions of the Executive Branch, the prospects for litigating non-final, unripe, or abstract disputes rises substantially. An important function of the traditional Article III requirements is to en-

sure that only concrete disputes are litigated. See, *e.g.*, *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 221-222 (1974).[13]

c. Constitutional Limits

For four decades, historical experience has defined and set the contours of *Flast*'s narrow exception to Article III's general prohibition on taxpayer standing. See *DaimlerChrysler*, 126 S. Ct. at 1864-1865. *Flast* was careful not to hold that the Establishment Clause itself, in all of its applications, warrants an exception to Article III. Courts have no authority to suspend Article III's constitutional limitations on their own jurisdiction, and the Establishment Clause itself has no greater claim to judicial enforcement than any other provision of the Constitution. *Flast* accordingly established its dual requirements that taxpayers (i) challenge Congress's exercise of its taxing and spending power, and (ii) allege a violation of a specific constitutional limitation on that power to ensure that its exception for taxpayer standing corresponded directly with the historic right not to "contribute three pence * * * for the support of any one [religious] establishment," 392 U.S. at 103. Respondents, like the court of appeals, would unravel both of these settled limits and thus would unmoor the *Flast* exception from any conceivable connection to Article III.

First, respondents would reduce the initial *Flast* prong to a pleading ritual. Because virtually all Executive (and Judicial) Branch activities entail the "spending of [taxpayer] funds" (Resp. Br. 27), the only real limitation on taxpayer suits that respondents would recognize would be a require-

[13] In addition, common usage rebels at the suggestion that every discretionary judgment by government officials that entails the use of taxpayer funds implicates the constitutionality of an appropriations law as applied. Every search and seizure requires law enforcement agents to spend appropriated funds, but any unconstitutional search or seizure that results does not, by reason of that use of taxpayer funds, implicate the constitutionality of the agency's appropriations law as applied.

ment that the Establishment Clause be invoked. The court of appeals attempted to limit that breach in Article III by adopting a "marginal or incremental cost" exception to taxpayer standing, Pet. App. 12a. But that approach is so constitutionally indefensible—Madison's objection was to a tithe of a mere three pence—and administratively impracticable (see Pet. Br. 36-38) that respondents themselves have abandoned it and candidly acknowledge that "the size of the expenditure" is not "relevant" (Br. 20 n.6).

Respondents propose in its place (Br. 19-21, 27, 33) their ill-defined traceability test. There are several problems with that approach. To begin with, this Court has never conceived of its taxpayer standing cases as being primarily about traceability. See, *e.g.*, *Valley Forge*, 454 U.S. at 480 n.17 (prefacing the Court's discussion of the "at best speculative and at worst nonexistent" nature of the "connection between the challenged property transfer and respondents' tax burden" as "not necessary to our decision"); *id.* at 497 n.10 (Brennan, J., dissenting) ("[T]he cases in which a tenuous causal connection between the injury alleged and the challenged action formed the basis for denying plaintiffs standing do not control the case of a taxpayer challenging a Government expenditure.").

Furthermore, traceability is just *one* of the "requisite" standing elements. A plaintiff still must demonstrate an injury in fact, as well as redressability. *DaimlerChrysler*, 126 S. Ct. at 1861; see *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Taxpayers generally lack standing to challenge government policies they dislike because they lack all three of Article III's irreducible minima for standing, including but not limited to the reality that any alleged injury stemming from the use of federal tax money alone is *not* meaningfully traceable to individual taxpayers. More directly, a federal taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others," is "comparatively minute and indeterminable," and "remote, fluctuating,

and uncertain." *DaimlerChrysler*, 126 S. Ct. at 1862 (quoting *Frothingham* v. *Mellon*, 262 U.S. 447, 487 (1923)). Respondents utterly fail to explain what makes their current complaint any more traceable than the "injuries" from a single speech of the Education Secretary, as featured in their original complaint, Pet. App. 73a-75a, or any other Establishment Clause claim that involves some expenditure of public funds. Indeed, respondents simply declare, without explanation (Br. 47-48), that taxpayer funds cannot be traced to "[s]peeches and meetings of executive branch personnel," but can be traced to speeches or discussions and meetings at conferences, at least if they are alleged to generate an impermissible "climate." Pet. App. 76a; see Resp. Br. 21.[14]

Flast's rationale did not and could not rest on any assumption that tax dollars impermissibly spent on religious activity are any more traceable or identifiable than tax dollars spent on any other allegedly unconstitutional activity. *Flast* instead rested on the notion that challenges to congressional decisions to use tax dollars to fund outside religious groups present a sufficiently discrete and concrete injury to satisfy Article III, in the same manner that a state-imposed tithe would give taxpayers qua taxpayers a cognizable injury.

In the same vein, respondents would replace the requirement that the taxpayer identify a "specific constitutional limitation[] imposed *upon the exercise of the congressional taxing and spending power*," *Flast*, 392 U.S. at 103 (emphasis added), with the requirement that the taxpayer simply identify a constitutional limitation upon the federal government. That is because what would make Executive Branch action unconstitutional (if respondents' allegations were correct and

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[14] Respondents propose (Br. 21) supplementing their traceability test with a "reasonable taxpayer" requirement. But they offer no framework for evaluating a taxpayer's unreasonableness, other than to emphasize that suits over even *de minimis* amounts of taxpayer money are permissible and hence reasonable (Br. 20 n.6).

if they stated an Establishment Clause violation) would not be the Establishment Clause's specific limitation on Congress's taxing and spending power (as would be the case in an as-applied challenge to a spending statute), but the Establishment Clause's direct application to the Executive Branch itself. Stated another way, what would make the examples of religious discrimination and proselytization that respondents cite (Br. 29-30) unconstitutional would *not* be the specific Establishment Clause limitation on congressional power referenced in *Flast*, but the Establishment Clause's independent limitations on the Executive Branch.[15]

This Court has already rejected the notion "that enforcement of the Establishment Clause demands special exceptions from [Article III's standing requirements]." *Valley Forge*, 454 U.S. at 488. And while respondents and their amici can imagine long lists of things the Executive Branch could do to violate the Establishment Clause, this Court has identified only one injury that confers taxpayer standing under Article III: The tandem legislative authority to "'extract[] *and* spend[]' * * * 'tax money' in aid of religion." *DaimlerChrysler*, 126 S. Ct. at 1865 (emphasis added). The Executive Branch has no capacity to "extract and spend" taxpayer

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[15] Respondents' list of supposed horribles (Br. 29-30) is not, in fact, jurisprudentially troubling. With respect to the purchase and provision of governmental property to religious entities (*id.* at 29), *Valley Forge* already precludes taxpayer standing. With respect to instances of religious discrimination (*id.* at 29-30), the victims of such discrimination could bring suit, see, *e.g.*, *Northeastern Fla. Ch. of the Associated Gen. Contractors* v. *City of Jacksonville*, 508 U.S. 656 (1993); 42 U.S.C. 2000e *et seq.*; 42 U.S.C. 2000bb *et seq.* Moreover, respondents' and its amici's equation of a lack of taxpayer standing with a license for government to ignore the Constitution's commands overlooks, *inter alia*, that (i) there are often plaintiffs available who have suffered traditional Article III injuries, (ii) the Executive Branch is a co-equal Branch of government whose officials are sworn to uphold the Constitution, and (iii) every other aspect of the Establishment Clause, see *Valley Forge*, *supra*, and every other provision of the Constitution has survived for more than two hundred years without being enforced in taxpayer suits.

money. The Executive Branch (like the Judicial Branch) has no independent capacity to extract taxes from taxpayers, and it can only spend taxpayer funds as Congress permits. See U.S. Const. Art. I, § 9, Cl. 7; *OPM* v. *Richmond*, 496 U.S. 414, 424-434 (1990).

Finally, respondents argue (Br. 41-42) that abandoning *Flast*'s established criteria for taxpayer standing is necessary because the Framers did not contemplate that appropriations laws would afford the Executive Branch substantial discretion. That is wrong. "[T]he First Congress made lump-sum appropriations for the entire Government," and "[e]xamples of appropriations committed to the discretion of the President abound in our history." *Clinton* v. *City of New York*, 524 U.S. 417, 466, 467 (1998) (Scalia, J., concurring in part and dissenting in part); accord *id.* at 446 (majority opinion); *id.* at 470 (Breyer, J., dissenting); see also *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 322 (1937).

B. *Flast* Is Limited To Challenging Congressionally Directed Disbursements Of Funds Outside The Government

The historic experience upon which the *Flast* exception rests implicated not just the congressional power to tax and spend, but a particular application of that power—decisions of the legislature to move money from the pocket of one taxpayer into the hands of another to support religious exercise. See Pet. Br. 38-45. Moreover, legislative actions that are the functional equivalent of state-compelled tithing not only were of distinct historic concern, but also present a clear nexus between the Establishment Clause injury and the status of taxpayers qua taxpayers. The exception recognized in *Flast* and *Kendrick*, therefore, is limited to the "disbursement of funds," *Kendrick*, 487 U.S. at 619, to entities outside of the government, not financing the operations of the Executive Branch. Indeed, that is precisely how Justice Harlan understood the *Flast* exception to operate. See, *e.g.*, *Flast*, 392 U.S.

at 122-123 (noting that the majority would distinguish between two programs involving equal expenditures because one is regulatory and the other involved "direct grants-in-aid"); see also *Valley Forge*, 454 U.S. at 511 (Brennan, J, dissenting) (noting that "the essential requirement of taxpayer standing recognized in *Doremus*" and *Flast* is a complaint not just about spending, but about "the distribution of Government largesse").

Respondents argue (Br. 42-45) that established religions entailed more than the extraction of taxes to subsidize the preferred church, and that taxpayer standing is necessary to ensure that the government is not "free to use taxpayer funds itself to establish religion" directly rather than through third parties (Br. 44). The Republic has survived more than 200 years without any effort on the part of the Executive "itself" to "build a church and make the facility available to a chosen religion" (Br. 44), and without the threat of taxpayer standing to challenge such an establishment. But in any event, that argument is simply a variant of the long-since rejected theory that "the Establishment Clause demands special exceptions from [Article III]." *Valley Forge*, 454 U.S. at 488.

In addition, as the amici Legal Historians explain (Br. 27), the Constitution's separation of powers "left no fear that the executive would ever be free independently to authorize the use of taxpayer dollars" for religious purposes. Amici are no doubt correct that, if the Framers had perceived Executive establishment as a serious threat, they would not have been indifferent. But, while that observation might be an answer to an argument that the Establishment Clause does not apply to actions of the Executive Branch, no one is making that argument here. And the observation that Establishment Clause violations by the Executive were all but inconceivable to the Framers only strengthens the argument that actions of the Executive did not form part of the historical concern on which the Court in *Flast* rested taxpayer standing.

The point of *Flast* was not that the central concern identified by the Court (*i.e.*, the "very 'extract[ion] and spend[ing]' of 'tax money' in aid of religion," *DaimlerChrysler*, 126 S. Ct. at 1865) was the only way that the Establishment Clause could be violated or even the only historical practice of concern to the Framers, but rather that this particular exercise of congressional power—unlike those giving rise to other alleged violations of the Establishment Clause—was sufficiently concrete and individualized and sufficiently analogous to a state-compelled tithe to give rise to Article III standing for taxpayers. Thus, while it is true that established churches involved more than tax subsidization, the relevant point for taxpayer standing purposes is the Framers' focus on that particular aspect of colonial establishments and the clear nexus between that practice and injury as a taxpayer.[16]

If *Flast* is narrowly limited to congressional exercises of taxing and spending authority that result in disbursements to outside entities, it can be defended as an application of normal Article III principles. In those circumstances, but those alone, the net effect of Congress's taxation and spending decisions can be analogized to a state-compelled tithe that a taxpayer would have standing to attack under ordinary Article III standing principles. But if *Flast* is expanded along the lines urged by respondents, then it can only be understood as an exception to—not an application of—ordinary Article III

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[16] It is a matter of historical debate whether the Church of England was, as respondents and their amici assume, structurally subsumed within the British government, or was instead a heavily regulated and controlled external entity that would fit the *Flast* paradigm. See, *e.g.*, McConnell, *supra*, at 2112-2115. What is most relevant for present purposes is that the model for religious taxation that was most familiar to the Framers—and the subject of Madison's Remonstrance—was the ordered payment of taxes to local churches and church entities for their religious use, rather than the payment of such taxes to a centralized governmental entity for the salaries and administrative needs of government employees. Cf. *Everson* v. *Board of Educ.*, 330 U.S. 1, 41 (1947) (Rutledge, J., dissenting) ("Tithes had been the lifeblood of establishment before and after other compulsions disappeared.").

standing principles. Needless to say, Article III courts are not free to fashion exceptions to the irreducible minimum requirements for Article III standing. Moreover, if the logic of *Flast* really requires the broad reading embraced by respondents and the court of appeals, then this Court must abide by the requirements of Article III, rather than the logic of *Flast*. Principles of *stare decisis* cannot justify the adverse possession of jurisdiction that is not granted to the courts by Article III.[17]

At bottom, respondents' complaint is not that the government itself is using tax dollars to finance the actual exercise of religion by third parties or even has taken any final, concrete agency action concerning funding for religious groups. Instead, respondents' central objection is to how government officials communicate and interact with other citizens and, in particular, Executive employees' alleged creation of a "climate" (Pet. App. 76a) that is intended to encourage eligible religious entities to participate, as they are legally entitled to do, in cooperative public programs. Their objection thus is not to the exercise of Congress's taxing and spending power as such, but to the words and actions of Executive Branch officials that respondents deem to be too favorable to religion in that they might induce other citizens to apply for federal funds, which might, in turn, someday result in some disbursement of taxpayer funds to some religious group. But when it comes to the Executive Branch's compliance with the Constitution in such routine functions, the taxpayer's interest is no different from that of the citizenry in general, all of whom have a right to—but not a chose in action to ensure—a government that obeys the Constitution. In other words, "the

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[17] In *Flast* itself, this Court justified "a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits" based only on "existence" of the "current debate" over the merits of *Frothingham*. See 392 U.S. at 94. *Flast* appears to have generated at least as much debate over its merits as *Frothingham*.

grievance which it is sought to litigate here is not a direct dollar-and-cents injury but a religious difference" over the conduct of governmental employees. *Doremus*, 342 U.S. at 434. Under Article III of the Constitution and this Court's precedents, taxpayers qua taxpayers lack standing to maintain such a claim.

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For the foregoing reasons, and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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